(15)

IN THE

Supreme Court of the United States

October Term, 1942.

No. 922

TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS,

Petitioner,

versus

KORA T. EVENS, WIDOW OF JAMES W. EVENS,

Respondent.

PETITION OF TEXAS PACIFIC—MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND SUPPORTING BRIEF.

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versus

KORA T. EVENS, WIDOW OF JAMES W. EVENS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of *certiorari* issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered on February 17, 1943, reversing with directions, the judgment of the District Court of the United States for the Eastern District of Louisiana, entered on April 1st, 1942.

I.

OPINIONS BELOW.

The opinion of the Court below, filed on February 17, 1943, is not yet reported but is found in the printed record beginning at page 62.

II.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioner is the Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans. The respondent, Mrs. Kora T. Evens, is a native of Alabama. Mrs. Evens, an elderly woman, arrived by train at the station operated by petitioner in the city of New Orleans, Louisiana, on the morning of June 16, 1939 (R. 19). She had undertaken a journey from Dallas, Texas, to Tuskegee, Alabama, and was traveling on a pass by one of the terms of which she agreed to assume all risk of injury to her person (R. 19, 51). The petitioner and respondent are agreed that by reason of respondent's assumption of this risk, she may recover only for injuries resulting from wilful acts or wanton negligence on the part of petitioner.

After Mrs. Evens descended from the train, she followed the red-cap, who was taking her bags toward the taxi stand (R. 20). As she passed through the gate separating the tracks from the concourse leading to the waiting rooms, she was struck a glancing blow by a loaded bag-

gage cart, pushed by another red-cap, a servant of your petitioner (R. 19, 27). As a result of the blow, she fell to the ground and was injured (R. 21, 22). Mrs. Evens was at no time aware of the approach of the baggage carrier or of her imminent injury (R. 21). Two bystanders in the concourse saw the carriage approach Mrs. Evens and shouted warnings, just as it struck her (R. 27, 45). There is no conflict in the testimony upon these events. Nor is there any conflict in the testimony to the effect that the red-cap saw Mrs. Evens when he was twenty-five feet from her (R. 36); that he was not aware that Mrs. Evens was lame and walking with a stick (R. 37, 38); that he was at no time actually aware that Mrs. Evens was in danger (R. 37); that after seeing Mrs. Evens the first time, he did not see her again but devoted his attention entirely to the task of seeing that the sides of his cart cleared the gate (R. 36); that the red-cap was at all times pushing the baggage buggy slowly (R. 27, 36, 46).

The definition of wanton negligence accepted by the District Court and the Circuit Court of Appeals and, for practical purposes identical with the definitions urged by both petitioner and respondent, appears in the language of the Circuit Court of Appeals, as follows: "Wanton negligence may be generally defined as an act (or failure to act where there is a duty to act) in reckless disregard of the rights of another, coupled with consciousness that injury is a probable consequence of the act or omission" (R. 64).

At the conclusion of the trial both parties moved for a directed verdict, but rulings upon the motions were re-

served, the cause was submitted to the jury and a verdict for respondent was returned. Petitioner thereupon moved for judgment *non obstante veredicto* and, in the alternative, for a new trial. Both motions were granted, judgment was entered, dismissing the suit, and respondent appealed. The United States Circuit Court of Appeals for the Fifth Circuit reversed the judgment appealed from and remanded the cause to the District Court. A petition for rehearing was denied and this petition for a writ of *certiorari* is now filed.

III.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938. (28 U. S. C. 347.)

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit was filed on February 17, 1943; petition for rehearing was filed on March 3, 1943; rehearing was denied on March 11, 1943. Application for a stay of mandate pending application in this Court for a writ of *certiorari* was made on March 16, 1943 and an order staying the mandate for thirty days, pending the application for writ of *certiorari* in this Court, was entered on March 19, 1943.

IV.

QUESTIONS PRESENTED.

Two questions are presented, as follows:

(1) Should not judgment be given, as a matter of law, in favor of defendant,

(a) where the plaintiff has the burden of proof, and

(b) where there is no conflict in the testimony and it does not establish objectively the elements of such proof, and

(c) where inconsistent inferences may be equally drawn from this unconflicting testimony and the plaintiff has thereby failed to sustain the burden of proof?

(2) Should not judgment be given as a matter of law in favor of defendant where the plaintiff's case is based upon an inference or inferences and there are undisputed facts inconsistent with such inferences?

V.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The United States Circuit Court of Appeals for the Fifth Circuit has herein decided a case involving important principles of law governing trials by jury in the Federal Courts in direct conflict with the rules prevailing

in the jurisdictions of other Circuit Courts of Appeal and now expressly declared by the Supreme Court of the United States in the case of *Pennsylvania R. Co. vs. Chamberlain,* 288 U. S. 333, 53 Sup. Ct. 391, (1933).

VI.

CONCLUSION.

WHEREFORE, it is respectfully prayed that this petition for a Writ of *Certiorari* to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on February 17, 1943, in the above entitled cause, be granted.

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WM. C. DUFOUR,
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1942.

No. .....

TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS,
Petitioner,

versus

KORA T. EVENS, WIDOW OF JAMES W. EVENS,
Respondent.

BRIEF ON BEHALF OF THE TEXAS PACIFIC-MISSOURI PACIFIC TERMINAL RAILROAD OF NEW ORLEANS, PETITIONER, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS AND ORDERS OF THE COURTS BELOW.

The judgment rendered by the District Court of the United States for the Eastern District of Louisiana will be found at page 54 of the record. The judgment of the United States Circuit Court of Appeals for the Fifth Circuit reversing this judgment and remanding the case to

the District Court will be found at page 71 of the record. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit will be found beginning at page 62 of the record.

II.

JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938 (28 U. S. C. 347).

III.

STATEMENT OF THE CASE.

The material facts and the questions involved herein will be found at pages 2 and 5 of the foregoing petition.

IV.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Fifth Circuit erred in refusing to apply the rules, laid down by the Supreme Court of the United States in the case of *Pennsylvania Railroad Company vs. Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391 (1933), (1) that judgment should be given, as a matter of law, in favor of the defendant, where the plaintiff has the burden of proof and

where there is no conflict in the testimony and it does not objectively establish the elements of such proof and where inconsistent inferences may be drawn from this unconflicting testimony; (2) that judgment should be given as a matter of law in favor of defendant where the plaintiff's case is based upon an inference or inferences and there are undisputed facts inconsistent with such inferences.

V.

SUMMARY OF ARGUMENT.

A. Where proved facts give equal support to each of two inconsistent inferences, judgment as a matter of law must go against party having the burden of proof.

B. Where the plaintiff's case is based upon an inference or inferences, the case must fall upon proof of undisputed facts inconsistent with such inferences.

VI.

ARGUMENT.

A. Where proved facts give equal support to each of two inconsistent inferences, judgment as a matter of law must go against party having the burden of proof.

This case involves the application of an uncontradicted record of facts to an accepted definition of wanton negli-

gence. Under the definition of wanton negligence it was necessary that respondent prove that petitioner's agent (the red-cap) acted or failed to act in reckless disregard of the rights of another, coupled with a consciousness that injury was a probable consequence of the act or omission.

Considering the testimony of all witnesses in the light most favorable to the respondent, as the testimony is considered in the prevailing opinion of the United States Circuit Court of Appeals, there can be found no direct testimony to support the necessary elements of the accepted definition of wanton negligence. At best it can be said only to support an inference of the necessary elements of wanton negligence. Likewise it supports the contrary inference.

In the case of *Ewing et al. v. Goode* 78 Fed. 442 (1897), at page 444, the Circuit Court for the Southern District of Ohio declared:

> "* * * Again, when the burden of proof is on the plaintiff to show that the injury was negligently caused by defendant, it is not enough to show the injury, together with the expert opinion that it might have occurred from negligence and many other causes. Such evidence has no tendency to show that negligence did cause the injury. When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither. Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co., 22 U. S. App. 102, 114, 9 C. C. A. 314, and 60 Fed. 993; Ellis v. Railway Co., L. R. 9 C. P. 551."

This rule has since received widespread application in the Circuit Courts of Appeal upon widely varying sets of facts. In the Eighth Circuit, the Circuit Court of Appeals used similar language in the case of *Fort Smith Gas Co. v. Cloud,* 75 F. (2d) 413, (1935), at page 416:

> "* * * Defendant was, of course, not responsible for the other exposures, and it is well settled that where proven facts give equal support to each of two inconsistent inferences, judgment must go against the party upon whom rests the burden of sustaining one of these inferences as against the other. Liggett & Myers Tobacco Co. v. De Parcq (C. C. A. 8) 66 F (2d) 678, and cases there cited; Wheelock v. Freiwald (C. C. A. 8) 66 F (2d) 694, and cases there cited."

Again in *Henry H. Cross Co. v. Simmons* (C. C. A. 8) 96 F. (2d) 482 (1938), at page 486, the same Court, speaking through the same Judge, said more elaborately:

> "To submit to a jury a choice of possibilities is but to permit the jury to conjecture or guess, and where the evidence presents no more than such choice it is not substantial, and where proven facts give equal support to each of two inconsistent inferences, neither of them can be said to be established by substantial evidence and judgment must go against the party upon whom rests the burden of sustaining one of the inferences as against the other. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819; Liggett & Myers Tobacco Co. v. De Parcq, 8 Cir., 66 F. (2d) 678; Eggen v. United States, 8 Cir., 58 F. (2d) 616; Fidelity & Deposit Co. v. Grand National Bank, 8 Cir., 69 F. (2d) 177. The impossibility of proof of material facts, while a misfortune, does not change rules of evidence, but leaves the one having

the burden of proof with a claim that is unenforceable. Burnet v. Houston, 283 U. S. 223, 51 S. Ct. 413, 75 L. Ed. 991."

This principle of law was considered at length by the Supreme Court of the United States in *Pennsylvania Railroad Co. v. Chamberlain,* 288 U. S. 333, 53 S. Ct. 391 (1933), and a definitive declaration was made in the following language, at pages 393 and 394:

"* * * It, of course, is true, generally, that where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury to determine, without regard to the number of witnesses upon either side. But here there really is no conflict in the testimony as to the facts. * * *

* * * *

"We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. * * *

* * * *

"The rule is succinctly stated in Smith v. First National Bank in Westfield, 99 Mass. 605, 611-612, 97 Am. Dec. 59, quoted in the Des Moines National Bank case, supra:

" 'There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled

> to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.' "

It is submitted that by this determination of the Supreme Court of the United States, the rule became binding upon all Federal Courts and must be considered by them when a motion is presented to withdraw a case from the jury. Nevertheless, although the authority of the Supreme Court's decision in the case of *Pennsylvania Railroad Co. vs. Chamberlain, supra,* was urged in this case upon the Circuit Court of Appeals as supporting the trial judge's judgment, the Circuit Court of Appeals declined to apply the rule and reached an opposite conclusion.

It is apparent from the prevailing opinion of the Circuit Court of Appeals, as well as from the record and from the dissenting opinion of Judge Hutcheson, that not only was there no conflict in the testimony as to what took place, but that inconsistent inferences may be drawn from that unconflicting testimony as to whether or not there existed consciousness of imminent peril to the respondent in the mind of the petitioner's servant.

In such a situation it became obligatory for the Circuit Court of Appeals to follow the rule of the Supreme Court of the United States, and failing to do so it has decided a

federal question in a way which conflicts with an applicable decision of this court.

B. Where the plaintiff's case is based upon an inference or inferences, the case must fall upon proof of undisputed facts inconsistent with such inferences.

Judge Hutcheson, in his dissenting opinion in the United States Circuit Court of Appeals quotes testimony at length from the record. He states that this testimony is uncontradicted and that it affirmatively shows the absence of consciousness of wrongdoing on the part of your petitioner's servant. This testimony directly establishes unassailed facts. These positive and uncontradicted facts, pointed out by Judge Hutcheson, conflict with the inference which must be drawn from the statement of fact of the prevailing opinion in order to comply with the accepted definition of wanton negligence. These facts negative the existence of the necessary elements of wanton negligence and an inference alone, drawn from other facts, cannot prevail or suffice to carry the case to the jury.

In *Pennsylvania Railroad Co. v. Chamberlain,* 288 U. S. 333, 53 S. Ct. 391 (1933), at page 394, the Supreme Court of the United States said:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought

to be inferred did not exist. This conclusion results from a consideration of many decisions, of which the following are examples. * * * (Cases cited) * * * A rebuttable inference of fact, as said by the court in the Wabash Railroad Case, 'must necessarily yield to credible evidence of the actual occurrence.' And, as stated by the court in George v. Mo. Pac. R. R. Co., supra, 'It is well settled that, where plaintiff's case is based upon an inference or inferences, the case must fail upon proof of undisputed facts inconsistent with such inferences.' "

CONCLUSION.

Petitioner therefore submits that a Writ of *Certiorari* should be granted to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in order that that judgment may be brought into conformity with the controlling decision of the Supreme Court of the United States.

Respectfully submitted,

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